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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1140

SISALCORDS DO BRAZIL, LTD.,

versus

FIACAO BRASILEIRA DE SISAL, S.A.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OFFICIAL REPORT BELOW

The case below is reported as *Sisalcords Do Brazil Ltd. v. Fiacao Brasileira De Sisal,* 450 F.2d 419 (5th Cir. 1971). The opinion of the Court of Appeals for the Fifth Circuit is appended hereto.

JURISDICTIONAL STATEMENT

The Court of Appeals for the Fifth Circuit entered its opinion on October 28, 1971, and a judgment was that day entered in accordance with Rule 36 of the Federal Rules of Appellate Procedure. On December 8, 1971, the United States Court of Appeals for the Fifth Circuit entered an opinion order on the Petition For

Rehearing and Petition For Rehearing En Banc denying same.

This Court has jurisdiction pursuant to 28 U.S.C. Section 1254 (1).

QUESTION FOR REVIEW

ARE RIGHTS OF A FOREIGN BENEFICIARY UNDER AN INTERNATIONAL IRREVOCABLE LETTER OF CREDIT SUBJECT TO SEIZURE AS PROPERTY OF THE FOREIGN BENEFICIARY FOR THE PURPQSE OF ACQUIRING JURISDICTION OF THE FOREIGN BENEFICIARY IN AMERICAN COURTS?

STATUTES INVOLVED

The following Louisiana procedural statutes are involved in a consideration of this cause. These relate to the manner of obtaining jurisdiction over a non-resident by way of attachment and garnishment of the non-resident's property.

Art. 8.

A court which is otherwise competent under the laws of this state has jurisdiction to enforce a right in, to, or against property having a situs in this state, claimed or owned by a nonresident not subject personally to the jurisdiction of the court. LSA-CCP Art. 8

Art. 9.

A court which is otherwise competent under the laws

of this state has jurisdiction to render a money judgment against a nonresident not subject personally to the jurisdiction of the court only if the action is commenced by an attachment of his property in this state. Unless the nonresident subjects himself personally to the jurisdiction of the court, the judgment may be executed only against the property attached. LSA-CCP Art. 9

Art. 2411.

The judgment creditor, by petition and after the issuance of a writ of fieri facias, may cause a third person to be cited as a garnishee to declare under oath what property he has in his possession or under his control belonging to the judgment debtor and in what amount he is indebted to him, even though the debt may not be due. He may require the third person to answer categorically and under oath the interrogatories annexed to the petition within the delay provided by Article 2412.

The seizure shall take effect upon service of the petition, citation, and interrogatories. LSA-CCP Art. 2411

Art. 3541.

A writ of attachment may be obtained when the defendant:

...

(5) Is a nonresident who has no duly appointed agent for service of process within the state. LSA-CCP Art. 3541

STATEMENT OF THE CASE

Petitioner, Sisalcords do Brazil is a New York corporation engaged in the business of importing and distributing sisal. Respondent is Fiacao Brasileira De Sisal, S.A., ("FIBRASA") a Brazilian corporation engaged in the exportation of sisal baler twine. The litigation between the parties originally commenced in the state courts of New York. A default judgment was obtained against respondent. In this action, Petitioner originally sought merely to execute this judgment against the property of FIBRASA allegedly within the jurisdiction of Louisiana Courts.

This action commenced in Louisiana State Courts on March 20, 1970 by writs of non-resident attachment and garnishment coupled with service of interrogatories. Respondent removed the cause to the United States District Court for the Eastern District of Louisiana on the grounds of diversity of citizenship.

In the Louisiana action, petitioner secured a writ of attachment and garnishment against the property of the defendant in the hands of garnishee, Hibernia National Bank. On March 20, 1970, the bank was cited and served with writs and garnishment interrogatories. The attachment and garnishment with interrogatories was levied at certain letters of credit believed to have been issued by the bank naming Respondent as beneficiary.

Prior to the bank garnishee's answers to interrogatories, but subsequent to removal, the New York judg-

ment was vacated, and Petitioner amended its petition to state its claims against respondent and maintain the attachment of the respondent's property.

In due course, the garnishee, Hibernia, answered the garnishment interrogatories stating that it had no property of the defendant subject to attachment. The respondent moved to dismiss the cause on the grounds of lack of jurisdiction over the person and/or property of the defendant. The District Court, the Honorable Judge Edward Boyle presiding, determined that Hibernia Bank had no property of the defendant subject to garnishment and attachment; thus, there was no jurisdiction. Petitioner prosecuted an appeal to the Court of Appeals, Fifth Circuit. The Court of Appeals affirmed the District Court and denied a rehearing in the case. From an adverse judgment petitioner brings this application for certiorari.

Hibernia National Bank, in answering the interrogatories of petitioner, stated it had no property of the defendant, but stated *facts* which indicated that the garnishee did have property of the defendant subject to garnishment, and that, *prior to answering petitioner's garnishment interrogatories but subsequent to service of same, did pay to the respondents or its agents the property subject to garnishment herein.* That property consisted of sums due and owing by the garnishee bank unconditionally to the respondent beneficiary under a certain letter of credit issued prior to attachment, and upon which drafts and bills of lading of the respondent had been drawn and which were in fact honored and paid by the garnishee bank to the

respondent or its agent upon presentation after service of the garnishment interrogatories, but before garnishee's answer thereto. (App., 27).

Garnishee's "Answer to Interrogatories" reveals the following facts:

(1) On February 9, 1970, garnishee did establish Irrevocable Letter of Credit No. 24349 and did on March 6, 1970, establish Irrevocable Letter of Credit No. 24381, for the account of Twi-Ro-Pa Mills Agency, Inc. of New Orleans, and in *favor of defendant* herein, Fiacao Brasileira de Sisal, S.A. ("Fibrasa").

(2) On or about February 9, 1970, (on the same date as the first letter of credit was issued by garnishee herein), defendant Fibrasa executed three drafts against the aforementioned letters of credit for amounts which are presently unknown by plaintiff, but believed to be in the amount of approximately $200,000.00. Said drafts were payable to Banco Do Brazil, S.A. and were forwarded to garnishee together with bills of lading, etc. There were bills of lading executed the same date and were drawn in accordance with the letter of credit in favor of Hibernia.

(3) Garnishee released, by endorsement, the bills of lading to Twi-Ro-Pa Mills (executed prior to garnishment and drawn in favor of Hibernia), paid the drafts drawn by Fibrasa against the irrevocable letter of credit executed in favor of Fibrasa, all in accordance with the instructions of Fibrasa or its collection agent. These events took place subsequent to the in-

stitution of these proceedings, with their service of writs of attachment and garnishment with interrogatories and prior to the garnishee's answer.

The transaction upon which petitioner's attachment was based was a classic letter of credit arrangement. Twi-Ro-Pa Mills Agency, Inc. of New Orleans apparently desired to purchase from the respondent, certain baler twine (or other commodity) manufactured by the defendant in Brazil. Twi-Ro-Pa ordered the twine from defendant, and then prevailed upon Hibernia to establish an irrevocable letter in favor of the beneficiary seller, Fibrasa.

The letter of credit was Hibernia's Irrevocable Letter of Credit No. 24349, dated February 9, 1970 in the amount of $206,087.00 (U.S.$). This letter was "forwarded through Banco Da Bahia, S. A., Joao Pessoa, Paraiba, Brazil" to the respondent. In relevant parts the letter provided that:

> "We hereby establish our Irrevocable Letter of Credit in your favor, for account of Twi-Ro-Pa Mills Agency, Inc., New Orleans, Louisiana for any sum or sums not exceeding: TWO HUNDRED SIX THOUSAND EIGHTY-SEVEN AND NO/100 U. S. DOLLARS available by your drafts on The Hibernia National Bank in New Orleans, New Orleans, Louisiana, at sight to be accompanied by the following documents
> * * *

> "Drafts drawn under this Credit must be marked: 'Drawn under the Hibernia National Bank in New Orleans Letter of Credit No. 24349 dated February 9, 1970', and must be negotiated or presented on or before May 25, 1970, on which date this credit expires."

> "We hereby engage with the bonafide holders, endorsers and drawers of such drafts that are drawn under and in compliance with the terms of this Credit, that same will meet with due honor on presentation and delivery of the documents as specified at The Hibernia National Bank in New Orleans, New Orleans, Louisiana."

The letters of credit did not provide that they were assignable.

On or about February 9, 1970, Fibrasa obtained the requisite bills and executed a draft against this letter of credit made payable to the order of Banco Do Brazil. Said draft was forwarded by Banco Do Brazil to Hibernia National Bank together with the requisite bills of lading and other documents subsequent to service of the garnishment, arriving in New Orleans subsequent to complainant's garnishment against Hibernia National Bank and prior to garnishee's answer to the interrogatories.

The District Court concluded that under these facts that the defendant, Fibrasa, had no property in the hands of garnishee at the time of garnishment and

attachment. The Court of Appeals for the Fifth Circuit agreed.

REASONS FOR GRANTING WRIT OF CERTIORARI

It is respectfully submitted that the Court of Appeals for the Fifth Circuit has created a conflict with the decision of the Court of Appeals for the Second Circuit in *Venizelos S.A. v. Chase Manhattan Bank*, 425 F.2d 461 (2d Cir. 1970). It is submitted that the Court of Appeals for the Fifth Circuit has misconstrued important aspects of Louisiana decisional law and of commerical law relative to letters of credit transactions. Finally, it is submitted that the issue is one of considerable commercial importance relative to the conduct of international trade through the letter of credit arrangement.

ARGUMENT

The conflict between the circuits and the importance of this matter in international commerce and trade is best understood by consideration of the legal background with respect to the rights and obligations under the international letter of credit transaction. It is in this area that the Court of Appeals has erred with respect to the international credit transaction and to commercial law generally. The conflict between the circuits arises because under Second Circuit thinking, performance by the beneficiary of an international letter of credit will irrevocably bind the issuing bank while under Fifth Circuit thinking, the bank's liability is imperfect. The decision of the Fifth Circuit in this matter is of importance to all who are creditors of

foreign nationals who cannot be found within the United States. As a result of the decision below, foreign debtors may do business in the United States through the medimum of letter of credit arrangements without fear that American creditors may reach the proceeds of the sale of the foreigner's goods while said proceeds repose in the possession of American banks.

A. Errors Relative To State Law And Commercial Law With Respect To The Letter Of Credit Transaction.

The appellate court misapprehended the valuable property right seized by appellant on March 20, 1971. The appeals court equated property with meaning an absolute liability on the part of the Hibernia Bank to pay. The error in this thinking is in regarding but one side of the letter of credit obligation, namely, the duty of the promisor bank to pay at the moment of the attachment. There is another side of that obligation, the right of the promisee beneficiary to perform and demand payment by the bank. This is a valuable right. In this case on March 20, 1970, the promisee had the right to produce the right documents by the date of expiration of the letter of credit and demand $248,000.00. Petitioner seized the promisee's rights to demand payment after the promisee had performed.

The concept of property as embraced in the law of Louisiana is broad indeed and embraces all manner of property. Louisiana Code of Civil Procedure Article 5251. As pointed out in the Trial Court's opinion, Article 240 of the Louisiana Code of Practice permitted attachment of a defendant's "property, rights, or credits."

Petitioner seized valuable rights of Fibrasa, the right to perform and obtain $248,000.00. The appellate court erred in not considering the seizure of this right through its equating property as meaning an obligation absolutely due by the Hibernia Bank. Louisiana's concept of property is far broader.

The proof of the value of the right to demand performance by the Hibernia Bank lay in the fact that Fibrasa shipped goods of great value to the United States on the strength of the right to demand monies on presentation of drafts and documents. On the strength of that same right, the Banco do Brazil presumably paid Fibrasa and undertook to collect sums from Hibernia. See *Scanlon v. First Nat. Bank*, 249 N.Y. 9, 162 N.E. 567; *Courteen Seed Co v. Hong Kong & S. Bkg. Corp.*, 261 App.Div. 495, 215 N.Y.S. 525 aff'd. 245 N.Y. 377. 157 N.E. 272.

Even if an absolute obligation to pay was required, that obligation existed on March 20, because the court below did not realize that Fibrasa had performed as of the date of seizure and that the Bank was bound at that moment. The letters of credit called for payment of sight drafts when accompanied by documents. On February 9, 1970, the respondent executed three drafts drawn against the letters of credit. These drafts were accompanied by appropriate documents. The drafts were drawn and the documents submitted and on their way to New Orleans prior to the attachment and seizure. The respondent had performed as of March 20, 1970. and, therefore, Hibernia was bound. *Venizelos S.A. v. Chase Manhattan Bank*, 425 F.2d 461 (2d Cir. 1970). The lower court has erred in holding that the

debt herein was merely contingent. It cited the case of *Moduel v. Mousseaux*, 29 La.Ann. 228 (1877), to the effect that property is subject to garnishment as to debts absolutely due by the debtor although not exigible. Exigible in the law of Louisiana means liquidated, demandable or matured. *Gulf Refining Co. v. Glassell*, 186 La. 190. 171 So. 846 (1936). In the case at bar, as previously pointed out, the debt was demandable, the goods were on their way, they belonged to the Bank and all that remained was the presentation of the sight draft.

A contingent liability is a liability which becomes due at some future time upon the occurrence of some future uncertain event. *Warren Co. v. C. I. R.*, 135 F.2d 679 (5th Cir. 1943). In this case, the uncertain event that occurred prior to the seizure herein, namely, the seller performed his obligation.

The lower court erred in classifying the obligation herein as contingent.

Authority for proceeding in the manner undertaken by petitioner herein is found in *Ericksson v. Refiners Export Co., Inc.*, 264 App.Div. 525, decided in the Appellate Division of New York. In that matter, an irrevocable letter of credit issued to a specifically named seller. The beneficiary assigned the proceeds to a third party, as was done in the case at bar. There, as here, a creditor of the beneficiary attached the property interests, whatever they might have been, of the beneficiary in the proceeds of the letter, by serving an attachment on the issuing bank before the issuing bank paid. The New York court upheld the seizure and recognized the rights of the attaching creditor.

B. Conflict Between The Circuits.

The Court of Appeals decision herein creates a conflict between the Second Circuit and the Fifth Circuit. In *Venizelos v. Chase Manhattan Bank*, 425 F.2d 461 (2d Cir. 1970), the Second Circuit held that where a beneficiary has performed under a letter of credit, then the bank is bound. In that case, there was no performance and, therefore, an attachment seizure seized nothing. In the case at bar, there was performance by the beneficiary within the meaning of *Venizelos* and, therefore, the Bank under *Venizelos* became bound. The decision of the Fifth Circuit is to the effect that even though there had been performance by the beneficiary, there was still no obligation on the part of the bank. In this case, the goods were shipped to the order of the Bank C.I.F. and were on their way at the time of seizure. The drafts were drawn and the documents were in transit. The goods belonged to the Hibernia Bank, but were then not paid for. The Bank bore the risk of loss for the seller's goods. Gilmore and Black, The Law of Admiralty, 97-98. The petitioner seized the respondent's right to claim the funds after performance by the respondent. The Fifth Circuit erred in holding that at the time of the seizure after the goods had been shipped there was no absolute liability on the part of the Bank, that its liability was only contingent. The Bank was then owner of the goods and bore the risk of loss as to them. The Bank's liability had been perfected.

The decision in the instant case conflicts with the decision in *Venizelos* of the Second Circuit. In the one case performance by a party was held to be the re-

quirement necessary to bind the Bank and in the second case the obligation after performance is looked upon as imperfect and contingent.

C. Important Social And Commercial Policy Considerations.

Petitioner respectfully avers that the issues raised herein are of social importance to the international commercial world. The instant decision permits foreigners to do business in the United States with impugnity. It permits them to enjoy a preferred status as to credits due them. It, in effect, removes obligations owed by American banks to foreign creditors from seizure by American creditors of the foreign debtors. Under the thinking of the decision herein, the only moment when an American creditor might attach and seize the funds due it from a foreign debtor would be the interval between the time of acceptance by an American bank of a sight draft and payment of that sight draft. The Court should consider the fact that the instant case permits foreigners to do business in the United States without fear that the proceeds from the sales of their products might be subject to seizure to satisfy debts due by the foreigner to the American creditor.

If a foreign seller can export to the United States, never appear in the country, handle all the financing through financiers and assignees, sell and still escape liability for prior debts, then where lies any protection for those Americans doing business with the foreigner? Does the American buyer have to obtain a foreign judgment, or at least foreign execution of a domestic

judgment, in the seller's own land? Does public policy permit a party to export to the United States, commit a wrong or break a promise, to an American and then depart to his homeland to continue to do business in this country through international financing, never having the property he exports subject to levy and attachment in this country. The result seems extreme, but what other property could such a party have in America except what was seized herein? The cargo? — Manifestly not. Title to the cargo passed under a C.I.F. bill lading to Hibernia when loaded aboard the vessel in a foreign port. Debt of Twi Ropa in America? — no, manifestly not. The American buyer ultimately buys his property from the bank not from the true seller. He purchases the bills of lading by paying the bank a sum of money. He is at most secondarily liable for the price. His dealings with the foreign seller have long since ended. What then is left? Only the letter of credit and rights arising therefrom in the direct contract between bank and seller or on the obligation to pay for cargo, title to which is vested in the bank. The force of the holding complained of is that a foreign corporation can sell $200,000 worth of cargo in the United States without ever having a debt owed by any person in the United States. The court has erred.

The fact that this letter of credit is or created property is demonstrated by the facts in this case. Because of the rights conferred by the credit, bankers, merchants, shippers, and producers of goods brought over $200,000.00 in sisal into the United States. The policy question before this Court is whether a foreign corporation can do business in this country with complete immunity for his assets from judicial seizure or attach-

ment. Can a foreign exporter who incurs obligations in this country escape responsibility for said obligations by financing his export/import obligations through a letter of credit.

CONCLUSION

For the above and foregoing reasons, it is respectfully submitted that a writ of certiorari to the Court of Appeals for the Fifth Circuit be granted herein.

Respectfully Submitted,

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CERTIFICATE

I HEREBY CERTIFY that three copies of the above and foregoing petition have been served upon MR. HAROLD R. AINSWORTH, 2307 American Bank Building, New Orleans, Louisiana 70130 and upon MR. LOUIS B. CLAVERIE and MR. PAUL HAYGOOD, 1300 Hibernia Bank Building, New Orleans, Louisiana 70112, by depositing same in the United States Mails, first class postage prepaid, this ____ day of MARCH, 1972.

WILLIAM A. PORTEOUS, III

APPENDIX

Case Reported at 450 F.2d 419 (5th Cir. 1971)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2008

SISALCORDS DO BRAZIL, LTD.,
Plaintiff-Appellant,
versus

FIACAO BRASILEIRA DE SISAL, S.A.,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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(October 28, 1971)

Before TUTTLE, INGRAHAM and RONEY, Circuit Judges.

PER CURIAM: This is an appeal from the judgment of the trial court dismissing a complaint based on an attachment seeking to subject the credit allowed in a letter of credit issued by Hibernia National Bank to garnishment.

The letter of credit issued to the Appellee did not create property belonging to it in the hands of the issuing bank. Thus the trial court properly upheld the answer of the garnishee to the effect that it held no property subject to garnishment. The exposition of the facts as contained in the memorandum opinion of the trial court cannot be improved upon. We affirm the judgment on the unpublished opinion of the trial court, which is appended hereto.

The judgment is AFFIRMED.

BOYLE, District Judge:

The defendant has moved to dismiss the complaint on the ground that the Court lacks jurisdiction. The events relevant to this matter are:

On March 20, 1970, Sisalcords Do Brazil, Ltd., plaintiff herein, petitioned a state court in Louisiana for recognition of a default judgment obtained in a New York State court against Fiacao Brasileria De Sisal, S.A. (FIBRASA), defendant herein. That same day a non-resident writ of attachment was obtained by the plaintiff in order to effect the seizure of defendant's property, naming the Hibernia National Bank in New Orleans, hereafter referred to as Hibernia, garnishee, upon whom garnishment interrogatories were served.

On April 7, 1970, defendant had the suit removed to the United States District Court for the Eastern District of Louisiana. The garnishee, Hibernia, filed answers to plaintiff's garnishment interrogatories on May 4, 1970, stating that it did not have any property,

rights or credits belonging to or due defendant, FIBRASA, at the time of service of the interrogatories. However, Hibernia did admit having issued in favor of FIBRASA two letters of credit numbered 24349 and 24381, dated February 9, 1970, and March 6, 1970, respectively. Hibernia also admitted that subsequent to service of the attachment it received three drafts drawn by FIBRASA against letter of credit #24349 payable to Banco Do Brasil, S.A. The proceeds of the drafts were remitted in accordance with the instructions of Banco Do Brasil. Hibernia stated in its answer that these drafts were the property of Banco Do Brasil.

Defendant brought its first motion to dismiss on May 5, 1970, urging that it had no property in the jurisdiction. On July 10, 1970, plaintiff filed an amended and supplemental complaint in which it alleged the same cause of action originally brought against defendant in New York, apparently because the basis of the Louisiana action, the New York judgment, had been vacated in May of 1970. No new garnishment against the Hibernia Bank was sought when the complaint herein was amended to assert a different cause of action.[1] Defendant, FIBRASA, again moved for dismissal for lack of jurisdiction on the grounds that it was not subject to personal service within the jurisdiction nor was proper service made. Plaintiff opposes both motions contending that jurisdiction over defendant was obtained through the non-resident writ of attachment.

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[1] In view of the result which we reach, we do not consider whether a further garnishment was necessary in order to obtain jurisdiction over the defendant.

Plaintiff concedes that if the letters of credit are not property within the meaning of the Louisiana provisions concerning attachment and garnishment, this Court has no jurisdiction. The sole question to be determined is whether said letters of credit are such property. If they are not, there was no attachment through which this Court could obtain jurisdiction. We hold they are not.

According to Article 9 of the Louisiana Code of Civil Procedure, a court has jurisdiction to render a money judgment against a non-resident provided that the action is commenced by an attachment of his property within the state. This article also provides that where the non-resident does not subject himself personally to the jurisdiction, the judgment rendered may be executed only against the property attached. Garnishment under a writ of attachment is governed by the provisions applicable to garnishment under a writ of fieri facias which are found in La. C.C. Pro. Art. 2411 et. fol. Property is defined by Article 5251, La. C. C. Pro. as including "all classes of property recognized under the laws of the state: movable or immovable, corporeal."[2]

To determine whether there was property belonging to defendant and whether that property was effectively seized it is necessary to consider the nature of a letter

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[2]Comment C under La.Civ. P. Art. 3541 (Grounds for Attachment) states:

> The source article [Art. 240 of the Code of Practice] refers to the defendant's "property, rights, or credits." The simple term property is sufficient to include all species of property, and is used throughout the title.

of credit. "A commercial letter of credit is a written instrument, ordinarily issued by a bank, authorizing someone, generally the seller of goods, to draw in accordance with certain terms and stipulating that such bills will be honored." 50 Am. Jur.2d *Letters of Credit* §1.

Generally, the terms of the letters of credit are that specified shipping documents and bills of lading accompany the drafts when presented for payment within a specified time period. A letter of credit facilitates commerce in that it enables the buyer to withhold payment until the goods are received, allows a bank to lend its credit without actually using its funds and permits the seller to receive his payment upon shipment of the goods. In all, three contracts are involved: the contract of sale between the buyer and the seller, the contract between the bank and the buyer who procures the letter, and the letter of credit between the issuing bank and the seller. 50 Am. Jur. 2d, *Letters of Credit* §4. *Venizelos, S.A.* v. *Chase Manhattan Bank*, 425 F.2d 461 (2d Cir. 1970).

Since a bank deals in instruments and not goods, it is not concerned with the contract of sale between the buyer and seller, and undertakes that it will honor drafts drawn and negotiated only in strict compliance with the terms of the letter. *Venizelos, S.A.* v. *Chase Manhattan Bank*, supra.

In this case, Hibernia issued two letters of credit in favor of defendant, FIBRASA. Letter #24349, dated February 9, 1970, was issued for any sum or sums not

exceeding $206,087.00 and contained the expiration date of May 25, 1970; letter #24381, dated March 6, 1970, was issued for any sum or sums not exceeding $42,-660.00 and contained an expiration date of May 1, 1970. Both letters stated that any drafts drawn against such letters must be accompanied by certain documents specified therein and that the drafts would have to be presented prior to the dates on which said letters expired.

On March 20, 1970, the date on which Hibernia was served with the writ and interrogatories, the letters of credit had been issued, but no drafts had been drawn against the letters nor had any shipping documents been received by Hibernia. As of that date, Hibernia had no absolute liability to FIBRASA since liability of the issuer of a letter of credit attaches only upon strict compliance with the terms of the letter before its expiration date. Since the conditions required to be performed for Hibernia to be obligated on the letter of credit had not been performed, Hibernia was not obligated on the letter of credit. *Venizelos, S.A.* v. *Chase Manhattan Bank*, supra.

Under Louisiana law the efficacy of an attachment is determined according to the facts existing at the date of the issuance of the writ and, if defective, it is not cured by subsequent events. *Anisman* v. *Nagle*, 177 La. 583, 148 So. 885 (1933) and cases cited therein; *Forbess* v. *George Morgan Pontiac Co.*, 135 So.2d 594 (1961). As of the date on which the writ and interrogatories were served, Hibernia had no funds in its possession which belonged to FIBRASA nor did it have

an absolute liability to FIBRASA under the letter of credit.[3]

Louisiana courts have determined that only property held by a garnishee, or debts absolutely due by him, though not exigible, at the moment the interrogatories are served are subject to seizure under a garnishment proceeding. *Moduel v. Mousseaux*, 29 La. Ann. 228 (1877). Except when provided for by statute contingent liabilities are not subject to garnishment. *Simon*

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[3]The New York case of *Seider* v. *Roth*, 17 N.Y. 2d 111, 269 N.Y.S. 2d 99, 216 N.E. 2d 312 (1966), involved the attachment of a contractual obligation. An automobile liability policy was issued in Canada to a Canadian motorist by an insurer doing business in New York. The insured had an accident in Vermont and under the policy the insurer was required to defend in any automobile negligence action. The question in *Seider* was whether the contractual obligation of the liability insurer was a debt owing to the insured which would be subject to attachment and whether jurisdiction was properly acquired by such an attachment. In answering the question in the affirmative the court stated:

> The whole question, therefore is whether Hartford's contractual obligation to defendant is a debt or cause of action such as may be attached. The Hartford policy is in customary form. It requires Hartford, among other things, to defend Lemiux in any automobile negligence action and, if judgment be rendered against Lemiux, to indemnify him therefor. Thus, *as soon as the accident occurred* there was imposed on Hartford a contractual obligation which should be considered a "debt" within the meaning of CPLR 502 and 6202. (Emphasis added.) 216 N.E. 2d at 314.

Though the policy existed, the contractual obligation which was held subject to attachment did not arise until the accident occurred.

It can be seen by analogy that the contractual obligation of Hibernia, in today's case, did not arise until the drafts and appropriate shipping documents had been received. Prior to that time there was no "debt" owing to the defendant by garnishee Hibernia.

v. *Hulse*, 124 So. 845, 12 La. App. 461 (1929); *Smith* v. *Tooke*, 120 So. 651, 10 La. App. 461 (1929). The principle enunciated in *Coleman* v. *Fennemore*, 16 La. Ann. 253 (1861), is apposite here. There, a garnishee had answered interrogatories, stating that it had no present indebtedness to the defendant, nor any future indebtedness except that contingent on the completion of a contract. This answer had not been traversed; therefore, the attempted garnishment was held not binding on the garnishee. In the present case the plaintiff failed to traverse Hibernia's answers to the garnish interrogatories which are similar to the answers in the *Coleman* case.

In attempting to show that the rights of the defendant to draw against the letters of credit are property rights which could be garnished, counsel for the plaintiff cites some interesting examples. Other than debts owed and unearned wages, clearly subject to garnishment, examples of property such as the right of a student to remain in school and the right of a tenant to public housing are suggested. One would hardly agree that the latter two "property rights" could be garnished under a writ of attachment. It is also noticed that any rights of the plaintiff under the letters of credit no longer exist since both letters of credit have long since expired. Furthermore, both letters of credit had expired prior to the filing of plaintiff's amended and supplemental complaint. Where jurisdiction is sought under a non-resident writ of attachment and there no longer exists the seized property on which jurisdiction is based, this court would be called upon to do a useless act. Execution of any judgment in favor of the plain-

tiff would be limited to the no longer existing property rights and would not personally bind the defendant unless it submits to the jurisdiction, which it has not.

Plaintiff also cites *Strawberry Growers' Selling Co.* v. *Lewellyn*, 158 La. 303, 103 So. 823 (1925), for the proposition that credits, such as represented by a letter of credit, are subject to garnishment. But in that case the only property attached, as shown by the answer of the garnishee, were funds of defendant deposited in the garnishee bank. While funds or credits may be attached, the facts of the present case, as revealed by the answers of the garnishee and the letters of credit found in the record, show that there were neither funds nor credits due the defendant as of the date on which the writ of attachment was served.

The Motion will be granted.

(Signed) EDW. J. BOYE, SR.
UNITED STATES
DISTRICT JUDGE

New Orleans, Louisiana
March 29, 1971

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2008

SISALCORDS DO BRAZIL, LTD.,
Plaintiff-Appellant,
versus

FIACAO BRASILEIRA DE SISAL, S.A.,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion Oct. 28, 1971, 5 Cir., 1971, ___ F.2d ____).

(December 8, 1971)

Before TUTTLE, INGRAHAM and RONEY, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

Supreme Court, U. S.
FILED
APR 6 1972
MICHAEL RODAK, JR., CLERK

NO. 71-1140

SISALCORDS DO BRAZIL, LTD.,

versus

FIACAO BRASILEIRA DE SISAL, S.A.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION, THE HIBERNIA NATIONAL BANK IN NEW ORLEANS, GARNISHEE.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1140

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BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION, THE HIBERNIA NATIONAL BANK IN NEW ORLEANS, GARNISHEE

OPINIONS BELOW

The opinion of the District Court is reported as a portion of the opinion of the Court of Appeals for the Fifth Circuit. The opinion of the Court of Appeals for the Fifth Circuit is reported at 450F.2d 419.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

When the Writ of Attachment and Garnishment Interrogatories were served on Hibernia, did Hibernia possess property of Fibrasa that was subject to attachment under the laws of Louisiana?

STATEMENT OF THE CASE

Petitioner herein, Sisalcords Do Brasil, Ltd., (hereinafeter "Sisalcords") on March 20, 1970, filed in the Civil District Court for the Parish of Orleans, State of Louisiana, in Civil Action No. 505-646, a "Petition for Recognition and Execution of Foreign Judgment and Writ of Attachment". The petition sought recognition of a New York judgment entered by default on September 15, 1969, against Fiacao Brasileira de Sisal, S.A., respondent in opposition herein (hereinafter "Fibrasa"), in the amount of $218,154.59. In addition, Sisalcords prayed that the court appoint an attorney at law to represent Fibrasa, Fibrasa being a Brazilian corporation with its sole place of business located in João Pessoa, Paraiba, Brazil; that a writ of attachment issue commanding the Sheriff of the Parish of Orleans to seize and attach all property of Fibrasa found within the jurisdiction of the Civil District Court, Parish of Orleans; and that The Hibernia National Bank in New Orleans, respondent in opposition herein (hereinafter "Hibernia"), be made garnishee. Service of the writ of attachment and garnishment interrogatories was made on Hibernia on March 20, 1970; subsequent to the filing of the petition herein; and on April 7, 1970, Fibrasa removed the action pending in the Civil District Court, Parish of Orleans, State of Louisiana, to the United States District Court for the Eastern District of Louisiana.

On May 4, 1970, Hibernia filed its answer to the garnishment interrogatories served on it. It answered said

interrogatories as follows:

QUESTION:

"Had you in your hands, or under your control, directly or indirectly, at the time of service of these interrogatories, or at any time since, any money, rights, credits, letters of credit, or other property whatsoever, belonging or due to Fiacao Brasileira De Sisal, S.A., defendant, or in which it has or had any interest for the whole or for a part, either direct or indirect, legal or equitable; and if yes, what is the nature, description and amount thereof, and is the same sufficient to pay or satisfy the full amount of said judgment rendered by the Supreme Court of New York in the amount of $218,154.59, or if less, to what amount?—you being asked and required to make a full disclosure in relation to the same."

ANSWER:

"Answering interrogatory No. 1, garnishee answers no, it did not have in its hands, or under its control, directly or indirectly, at the time of service of the interrogatories herein, or at any time since, any money, rights, credits, or other property whatsoever, belonging or due to Fiacao Brasileira De Sisal, S.A., defendant, or in which it has or had any interest for the whole or for a part, either direct or indirect, legal or equitable. Garnishee did, on February 9, 1970, establish Irrevocable Letter of Credit No. 24349 and did, on March 6, 1970, establish Irrevocable Letter of Credit No. 24381 for the account of Twi-Ro-Pa Mills Agency, Inc., New Orleans, Louisiana in favor of FIBRASA, Fiacao Brasileira de Sisal, S.A., (hereinafter referred to as "Fibrasa") copies of which letters of credit are attached hereto as Exhibits A and

B, respectively. However, at the time of service on garnishee on March 20, 1970, no sums were due under the aforesaid letters of credit.

Subsequent to service of the attachment herein on garnishee, garnishee received from Banco Do Brasil, S.A. three drafts drawn by Fibrasa against the aforesaid letter of credit No. 24349, dated February 9, 1970, payable to the order of Banco Do Brasil, S.A., with attached bills of lading and other documents in accordance with the terms of the aforesaid letter of credit. Such drafts were the property of Banco Do Brasil, S.A., and Fibrasa had no interest or property right, direct or indirect, in such drafts, Banco Do Brasil, S.A., being the unconditional owner thereof. In accordance with the terms of the aforesaid letter of credit, garnishee released the bills of lading to Twi-Ro-Pa Mills Agency, Inc., and remitted the proceeds of the drafts in accordance with the instructions of Banco Do Brasil, S.A."

QUESTION:

"Were you, at the time of service upon you of these interrogatories, or since, directly or indirectly, legally or equitably, indebted or obligated unto the said defendant or (*sic*) anything or for any sum whatever, whether for yourself alone or together with others, in consequence of any sale or exchange or transaction of any kind whatever, whether the same be due or to become (*sic*) direct or indirect, legal or equitable, or be for the whole or a part only or whether it be by bill, note, letter of credit or otherwise; and if yes, what is the nature, description and amount thereof, and is the same sufficient to pay or satisfy the full

amount of said writ and costs, or if less, what amount?—you being asked and required to make a full and detailed disclosure in relation to the same."

ANSWER:

"Answering interrogatory No. 2, garnishee says no. See garnishee's answer to interrogatory No. 1."

QUESTION:

"Have you, at any time since the service of notice of seizure in your hands herein made, directly or indirectly, legally or equitably, unto or with the said defendant or his agent any payment or innovation or compromise, or arrangement or given defendant or his agent any note or written obligation or credit or payment or received from him directly or indirectly any receipt or acquittance?—and if yes, state the nature, description and amount thereof, and the time, place and circumstances of the same."

ANSWER:

"Answering interrogatory No. 3, garnishee answers no. See garnishee's answer to interrogatory No. 1."

The letters of credit to which reference was made by Hibernia in its answer to the garnishment interrogatories provided that drafts "drawn under and in compliance with the terms of this Credit" would be honored "on presentation and delivery of the documents as specified at The Hibernia National Bank in New Orleans, New Orleans, La." The documents required included detailed invoices stating that the invoices covered specified twine in accordance with prices and other requirements listed in the letter of credit, test and specification certificates issued by Fibrasa certifying that the twine conformed to certain specifications, and full sets of clean, on

board ocean bills of lading issued to the order of the Hibernia "Notify Twi-Ro-Pa Mills Agency, Inc." and dated not later than specified dates. The letters of credit were established for the account of Twi-Ro-Pa Mills Agency, Inc., the Hibernia's customer, and addressed to Fibrasa.

Subsequent to Hibernia's filing its answer to the garnishment interrogatories, Fibrasa filed, on May 5, 1970, a motion to dismiss for lack of jurisdiction. Two days later, the answer of Hibernia to the garnishment interrogatories was served on Sisalcords by the United States Marshal, which answer was never traversed by Sisalcords. Then, as all parties concede, on May 26, 1970, the New York courts set aside the judgment on which Sisalcords based its March 20, 1970 petition.

In the meantime, on May 1, 1970, Letter of Credit Number 24381 expired; and, on May 25, 1970, Letter of Credit Number 24349, against which were drawn the drafts to which reference was made in Hibernia's answer to the garnishment interrogatories, expired.

On July 10, 1970, Sisalcords filed a "Supplemental and Amended Complaint" in the United States District Court for the Eastern District of Louisiana submitting an "alternative cause of action to the complaint originally filed". On August 5, 1970, Fibrasa once again moved to dismiss for lack of jurisdiction; and on March 30, 1971, a minute entry dated March 29, 1971, was entered granting Fibrasa's motion to dismiss for lack of jurisdiction. In its Memorandum Opinion, also filed on March 30, 1971, the District Court concluded that there was no property of Fibrasa subject to siezure and hence that Sisalcords obtained no jurisdiction by the service of its writ of attachment. The judgment of the District Court was affirmed, *per curium*, *Sisalcords Do Brasil, Ltd. v. Fiacao Brasileira de Sisal, S.A.*, 450F.2d 419 (5th Cir. 1971), and

petitions for rehearing and rehearing en banc were denied. F.2d , (5th Cir. 1971). Petitioner has filed with this Court a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

ARGUMENT

May It Please the Court:

I.

THE DECISIONS OF THE DISTRICT COURT AND THE COURT OF APPEALS ARE CORRECT AS A MATTER OF LOUISIANA LAW.

It is clear that there is no liability on the part of a bank issuing a letter of credit in the absence of strict compliance with the terms of the letter of credit. *Venizelos, S.A. v. Chase Manhatten Bank*, 425 F. 2d 461, 465 (2d Cir. 1970). See also, e.g., *Lamborn v. National Bank of Commerce*, 276 U.S. 469, 48 S. Ct. 378, 72 L. Ed. 657 (1928); *Old Colony Trust Co. v. Lawyers' Title & Trust Co.*, 297 F. 152 (2d Cir.), *cert. denied*, 265 U.S. 585, 44 S. Ct. 459, 68 L. Ed. 1192 (1924); *North Woods Paper Mills v. National City Bank*, 121 N.Y.S.2d 543 (1953), aff'd, 283 App. Div. 731, 127 N.Y.S.2d 663 (1954).

The letters of credit in the case at bar required *presentation* and *delivery* to Hibernia of certain clearly-specified drafts, invoices, certificates and bills of lading before Hibernia was obligated to pay anyone pursuant to the letters of credit. It is undisputed that, at the time service on Hibernia was made, no such drafts, invoices, certificates and bills of lading had been delivered to Hibernia. Despite the suggestion of Sisalcords that the conditions of the letters of credit had been met at the time the seizure was attempted, the District Court and Court of Appeals correctly concluded that there was no obligation of

Hibernia under the letters of credit at the time of service of the writ of attachment and garnishment interrogatories because the necessary documents had not been *presented* and *delivered* to Hibernia in accordance with the terms of the letters of credit. Therefore, *no one* had any right to be paid under the letters of credit when service of the attachment and garnishment interrogatories was made on Hibernia. Indeed, even if Fibrasa itself had appeared at Hibernia and demanded payment under the letters of credit, Hibernia would have been under no obligation, and indeed would have had no right, to make any payment to Fibrasa in the absence of its presenting the documents required by the letters of credit. It is, therefore, abundantly clear that Hibernia held no property of Fibrasa and was not indebted to Fibrasa at the time the writ of attachment and the garnishment interrogatories were served upon Hibernia.

The only right that Fibrasa could be said to have had under the letters of credit, when the interrogatories were served upon Hibernia, was the inchoate and wholly contingent right to receive the payment of funds at a future time and prior to the expiration of the letters of credit upon then strictly complying with the requirements of those letters of credit. This kind of uncertain contingent future right, in the absence of statutory provisions to the contrary, [e.g., wage garnishments, see La. R.S. 13:3921 et seq. (1950)], is not subject to garnishment under the law of Louisiana. *Silverman v. Grinnell*, 165 La. 587, 115 So. 789 (1928); *Maduel v. Mosseaux*, 29 La. Ann. 228 (1877); *Smith v. Tooke*, 120 So. 651 (La. App. 2d Cir. 1929). See also *First National Bank of Natchez v. A. Moss & Co.*, 41 La. Ann. 227, 6 So. 25 (1889); *Denegre v. George Milne & Co.*, 10 La. Ann. 324 (1855); *Blanchard v. Grousset*, 1 La. Ann. 96 (1846).

As the District Court correctly concluded:

> "Under Louisiana law the efficacy of an attachment is determined according to the facts existing at the date of the issuance of the writ and, if defective, it is not cured by subsequent events. *Anisman v. Nagle*, 177 La. 583, 148 So. 885 (1933) and cases cited therein; *Forbess v. George Morgan Pontiac Co.*, 135 So. 2d 594 (1961). As of the date on which the writ and interrogatories were served, Hibernia had no funds in its possession which belonged to Fibrasa nor did it have an absolute liability to Fibrasa under the letter of credit." (Footnote omitted).

Service of the writ of attachment and of the garnishment interrogatories on Hibernia, therefore, effected no seizure of any property of Fibrasa. See, *e.g.*, *Coleman v. Fennimore*, 16 La. Ann. 253 (1861), in which the Louisiana Supreme Court held that a judgment against a garnishee could not be sustained where the only indebtedness of the garnishee to the defendant, at the time of the attachment, consisted of payments under a contract that might or might not be completed and that might or might not, therefore, be due. Similarly, in the case at bar, at the time the writ of attachment and the garnishment interrogatories were served on Hibernia, the only obligation of Hibernia to Fibrasa, if any, was pursuant to the two letters of credit whose conditions might or might not be met in the future. As stated by the Louisiana Supreme Court in *Maduel v. Mosseaux*, *supra*, "The true test [of whether there is property of the defendant subject to seizure] is, what could the debtor recover of the garnishee at the date of the service [of the garnishment interrogatories]?" 29 La. Ann. at 231. Inasmuch as the conditions of the letters of credit had not been satisfied at such time, clearly no one could have obtained anything from the garnishee, Hibernia, at the date of service. Hence, under the test established by the Louisiana Supreme Court in the *Maduel* case, there was no valid seizure of any property of Fibrasa as a result of service on Hibernia of the writ of attachment and

garnishment interrogatories. Thus, it is clear that Louisiana law clearly supports the conclusion of the District Court and the Court of Appeals in this diversity case that, as a matter of Louisiana law, no valid seizure of Fibrasa's property was made and that, therefore, there is no jurisdiction over Fibrasa, the nonresident defendant. The *Ericksson* case, a New York case cited by petitioner, even if relevant in a Louisiana diversity case such as the one at bar, is clearly distinguishable, since in the *Ericksson* case seizure was made *after* presentation of all of the documents required by the letter of credit. We, therefore, respectfully submit that the petition for a writ of certiorari should be denied.

II.

THE DECISION OF THE COURT OF APPEALS CREATES NO CONFLICT WITH DECISIONS OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner contends that there is a conflict between the decision of the Court of Appeals for the Fifth Circuit in this matter and the decision of the Court of Appeals for the Second Circuit in *Venizelos v. Chase Manhattan Bank*, 425 F.2d 461 (2d Cir. 1970). In making such a contention, petitioner suggests that such a conflict exists because the decision of the Fifth Circuit "is to the effect that even though there had been performance by the beneficiary, there was still no obligation on the part of the bank." (Brief of petitioner at p. 13).

Such a contention assumes the basic conclusion that there was performance of the obligations under the letters of credit prior to the seizure. As we have previously shown, and as the District Court and Court of Appeals correctly concluded, there

was no such performance since the required presentation and delivery of documents did not occur prior to the seizure. Moreover, even if such a conflict did exist, it would be a conflict between two Courts of Appeals applying the substantive law of two separate states and, as such, not the type of conflicts between the circuits that requires resolution by this Court. Obviously there will be conflicting rules of law announced by different Courts of Appeals when such Courts are applying the law of different states. Such conflicts are the natural result of our federal system in which the substantive law of one state may differ from that of another, and the resolution of such conflicts is neither desirable nor allowable under the rule laid down by this Court in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

III.

IMPORTANT POLICY CONSIDERATIONS SUPPORT THE DECISIONS OF THE DISTRICT COURT AND THE COURT OF APPEALS.

Petitioner argues that important social and commercial considerations require reversal of the decisions below. We respectfully submit that, under the doctrine of *Erie Railroad Co. v. Tomkins, supra,* the decisions below must be affirmed as correct applications of the law of Louisiana. Moreover, even if policy considerations of the federal courts are relevant to a determination of state substantive issues in a matter in the federal courts only as a result of diversity jurisdiction, such policy considerations weigh heavily in favor of affirming the decisions below. Petitioner itself in its brief to the Court of Appeals recognized that:

"If this Honorable Court holds for plaintiff, financial

> institutions will decry such a decision as judicial "intervention" in the otherwise relatively immune commercial world of international transactions; bankers would assail the new imposition on the sanctity of international paper; relations with foreign banks would be strained; the entire letter of credit system would be assaulted."

The reason for such a potential result is obvious: foreign shippers would be unable to obtain financing for shipments into the United States, because foreign banks would be unwilling to take the risk that contingent credits made available to such foreign shippers, or holders of their drafts, might be subject to seizure before such drafts are presented for payment under the letter of credit. The implications of such a result are enormous, and its potential effects catastrophic. In the absence of clear authority under the law of Louisiana requiring such a result to be reached, which is not present in this case, we submit that, as a matter of policy, such a course of action should be rejected.

Petitioner argues that affirming the judgment of the District Court and the Court of Appeals would require petitioner and others doing business with foreign corporations to sue their foreign customers in foreign courts. This obviously would not be true in many cases, as such foreign customers often have assets available for seizure within the United States. However, even if companies such as petitioner are forced to pursue their claims in foreign courts, such companies obviously take that risk when they elect to do business with a corporation located in a foreign country. In the case at bar, petitioner, having elected to take that risk, now seeks to avoid the burden of pursuing Fibrasa in Brazil by urging a construction of the law of Louisiana with respect to attachment that, we submit, clearly

has no support under Louisiana law. Indeed, as we have previously shown, the law of Louisiana is to the contrary. Hibernia, in making partial payment under one of the letters of credit, obviously acted in reliance on the clear law of Louisiana that no property of Fibrasa was attached under the circumstances of the case at bar. It would, therefore, be inequity of the greatest sort for this Court to reverse the District Court and the Court of Appeals and, in effect, impose liability on the innocent third party herein, Hibernia, in an effort to provide recourse to a corporation that chose to do business with a company that it knew to be located in Brazil. Under *Erie* such a result must be rejected and the petition for a writ of certiorari denied.

Finally, besides the fact that the law of Louisiana and policy considerations support the decisions below, and that there is no conflict between the decisions of Courts of Appeals for the Second and Fifth Circuits, we respectfully submit that logic also supports the decisions below and the denial of a writ of certiorari. How can an attaching creditor ever obtain funds from a garnishee bank that has issued a letter of credit? The garnishee bank may not, under the terms of the letter of credit, pay out any funds under such letter of credit, to the attaching creditor or anyone else, until the bank has obtained all of the necessary bills of lading, drafts and other documents required by its letter of credit. The drafts drawn under a letter of credit make the delivery to the bank of the attached bills of lading and other documents conditioned upon the payment by the bank of the amount of the draft. Unless payment of the draft is made by the bank, the bank cannot obtain the bills of lading and other documents attached thereto. If contingent rights to future payments under a letter of credit were held to be subject to seizure, as petitioner contends, a bank, once served with a writ

of attachment and garnishment interrogatories, could never pay out funds under the letter of credit and could never, therefore, obtain the bills of lading. However, unless the bank obtains such bills of lading it has no right under the letter of credit to pay out any funds to anyone, including the seizing creditor, and, therefore, the letter of credit would merely expire at the end of its effective term. Nothing would ever be due any seizing creditor and nothing would have been seized under the attachment. To express it somewhat differently, under the bank's obligation to its customer, the bank is not to make payments under the letter of credit until the bank acquires the bills of lading and other documents specified in the letter of credit. On the other hand, the one presenting the draft to the bank will release to the bank the bills of lading and other documents only upon payment to it of the amount of the draft drawn under the letter of credit. Obviously, therefore, an impasse is reached. This means that the bank would never be under any obligation to pay out anything under the letter of credit to anyone. The letter of credit would, therefore, expire by its terms as a wholly worthless piece of paper without payment either to a seizing creditor or to anyone else.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE

I hereby certify that three copies of the above and foregoing brief have been served upon Harold R. Ainsworth, Esquire, 2307 American Bank Building, New Orleans, Louisiana, 70130; and William A. Porteous, III, Esquire, 925 Hibernia Bank Building, New Orleans, Louisiana 70112, by depositing same in the U.S. Mail, postage prepaid, properly addressed, this day of April, 1972. I further certify that all parties required to be served have been served.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Supreme Court, U. S.
FILED
APR 18 1972
MICHAEL RODAK, JR., CLERK

No. 71-1140

SISALCORDS DO BRAZIL, LTD.,

versus

FIACAO BRASILEIRA DE SISAL, S. A.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1140

SISALCORDS DO BRAZIL, LTD.,

versus

FIACAO BRASILEIRA DE SISAL, S. A.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONER

Question Before This Court

Hibernia National Bank of New Orleans, Louisiana has filed a brief in opposition to this petition in an effort to support the decisions of the courts below but it succeeds only in making their errors more apparent. The question for this court still remains, was there a property interest of the defendant, Fiacao Brasileira de Sisal, S.A. (hereinafter referred to as defendant) by the service of the writ in attachment upon Hibernia National Bank on March 20, 1970. Upon that depends the correctness of the lower court's dismissal of this suit for lack of jurisdiction.

POINT ONE

The courts below erred in holding that there was no property interest of the defendant attached, on a consideration of the pleadings, resulting in

a. The departure from the prevailing rule in this court and in the other circuits;

b. Deprivation of plaintiff's right to a trial by jury of the fact issues presented in the pleadings.

The Property Interest Of The Defendant

The writ in attachment against defendant's property was served upon Hibernia National Bank on March 20, 1970. Did Hibernia have any species of property of the defendant at that time? It is conceded that, at that time, Hibernia had outstanding two irrevocable letters of credit addressed to the defendant. One was dated February 9, 1970 and bore number 24349 stating it would pay defendant's draft up to $206,087 against documents described on or before May 25, 1970. The other was dated March 6, 1970 bore number 24381, it was to the same effect as letter number 24349 but expired May 1, 1970 and was for $42,660. Both letters had been sent on their respective dates to defendant and were effective according to their terms on March 20, 1970. Neither letter stated that they were assignable or transferable or payable to bearer. Copies of the letters are reproduced a pp. 34 and 35 of Appellant's Appendix.

Text writers say that letters of credit are contracts between the issuer (usually a bank) and the beneficiary to pay the amount stated according to the terms stipulated. Thus, they state an obligation on the part of the bank to pay, and on the part of the beneficiary to demand payment, on or before their expiring date. In effect, the transaction is a promise to buy documents as described in the letter. See p. 392, Volume 6, Michie on Banks and

Banking; Finkelstein, 1930, Legal Aspects of Commercial Letters of Credit; McCurdy, 35 Harv. L. R. 715; 50 Am. Jur. 2d, Letters of Credit, Sections 1, 28, 29 and 30. These writers uniformally assert the foregoing general contractual obligations as being of the very nature of letters of credit. They cite, in support, cases in this court, in many circuits and in the state courts throughout the land.

Where the letter is addressed to a specifically named party, only that party is entitled to draw on the letter. See Sections 7 and 17 of 50 Am. Jur. 2d, Letters of Credit; 9 C.J.S., Banks and Banking, Sections 175-176; *Bank of Buchanan County* v. *Continental National Bank*, 277 F. 385; and *American Steel Co.* v. *Irving National Bank* (2 C.A.), 266 F. (2d) 43. A special letter never attains the status of a negotiable instrument lacking as it does, negotiability. Assignments by the beneficiary whether by draft, endorsement or separate assignment, are not binding upon the issuer until communicated to it and then they are subject to all of the infirmities existing in the assignor-beneficiary. See *Carrolton Bank* v. *Tayleur*, 16 La. 490; *Finkelstein, supra*, at pp. 277, 278; *Evansville National Bank* v. *Kaufman*, 93 N.Y. 273; and *Ericksson* v. *Refiners Export Co., Inc.*, 264 App. Div. (N.Y.), 525, 527, 528.

Admittedly, Hibernia had not paid the letter of credit before the attachment of March 20, 1970. The only proof of date of payment was Hibernia's answer that the payment was made subsequent to the attachment. Hence, on March 20, 1970, the attachment seized whatever right the defendant had in the two letters of credit. The right was to receive payment upon presentation of the prescribed documents before the expiration dates in May. The courts below have said that no property was attached because on the day in question, the issuing bank had not yet received the documents which would oblige it to pay; hence there was no obligation to pay. Nothing was said of defendant's right, according to the contract, to produce those docu-

ments within the time before the expiration date. Couldn't such a right be enforced in equity? This was overlooked. Indeed, the documents were produced timely and the money was paid. According to the answers of Hibernia, it paid the money to Banco do Brasil, the holder of the draft, on a draft dated February 9, 1970. If that date of that draft means anything, it is that on February 9, 1970, the defendant had already exercised its demand for payment; so that on the date of the attachment Hibernia's obligation had accrued.

The courts below did not hold that Banco do Brasil had priority over the plaintiff. The right of this attachment creditor vis-a-vis; the right of an assignee of the defendant, was never considered or decided by the courts below. Yet, it held that Hibernia had no property of the defendant on two rounds. One in reliance upon *Venizelos* v. *Chase Manhattan Bank* (2 C.A. 1970), 425 F. (2) 461; and the other, on the fact that Hibernia had answered the interrogatories accompanying the writ, ambiguously, by stating it had no property and at the same time attaching the letters of credit which were then outstanding. In any case, in concluding as it did, the court made no analysis of the facts to arrive at its decision.

In relying upon the *Venizelos* case, the court erred as the question here was not involved in Venizelos. Albeit, Venizelos does affirm the liability of the issuing bank to pay the beneficiary upon the presentation of the specified document and the right of the beneficiary to receive such payment. The case considered the liability of the bank in two separate capacities, viz., (a) as the issuer of the letter; and (b) as a depositary of assets, if any, of the party dealing with the beneficiary. The beneficiary sued to recover both as the beneficiary of the letter and as a judgment creditor of Perfilas, the party in business relationship with the plaintiff who had caused the letter to be issued. There was no showing that the bank had any

assets of Perfiles on the date of the service of the execution upon it. The Court of Appeals correctly allowed plaintiff to receive payment under the letter of credit when it held that plaintiff had complied with its terms by submitting the prescribed documents, and it denied recovery on plaintiff's claim as a judgment creditor.

To confuse the holding on that part of the *Venizelos* case denying recovery because the bank was not a depositary of assets of Perfiles with the contractual position of Hibernia to pay as it existed on March 20, 1970, was and is error of the plainest sort. That part of the *Venizelos* case dealing with the position rightfully analogous to the position of Hibernia here, supports the existence of a contractual obligation to pay. *Venizelos*, thus, represents the rule of the Second Circuit that such a contractual obligation was a subsisting contractual obligation with correlative rights in the beneficiary. By the same token, the decisions below would seek to impose a different rule in the Fifth Circuit.

Of course, the reliance upon the conclusory allegation of no property in the bank's answers does not make that allegation conclusive, when at the same time the bank attached copies of the letters of credit and conceded that they were outstanding on March 20, 1970. The conclusion of the pleader is not accepted in place of the writing which is attached *in haec verbe* and it, in fact, defines the relationship of the parties. See Rule 10(c) F.R.C.P.; 71 C.J.S., Pleadings, Sections 30 and 33; *American Surety Co.* v. *Federal Reserve Bank of Kansas City*, D.C. Mo., 1930, 29 F. Supp. 940.

Hibernia here says that on March 20, 1970, it had no property of the defendant because its letters were expressions of a contingent obligation which was not yet performed. Hence, there could not be any liability on its part to pay. This conclusion is obviously erroneous because the letters were outstanding and they had been since

they were sent to the beneficiary on February 9, 1970 and March 6, 1970. They bound the bank, as issuer, to their terms. The issuer had no power to alter those terms before the expiration of the letter without the consent of the beneficiary. See, 6 *Michie on Banks and Banking, Chapter 12, Section 30; Lamborn* v. *National Park Bank*, 123 Misc. Rep. 211, aff'd 212 App. Div. 25; 240 N.Y. 520; and *Dulien* v. *Bankers Trust Co.* (S.D.N.Y.), 189 F. Supp. 922. That obligation was there whether the draft and documents were received before or after the attachment date. In support of its opposition, Hibernia relies on several cases all antedating 1961 when the Code of Louisiana was revised to liberalize the existing rules on attachment among other practices. Under LSA-CCP Art. 8, the Code defines what may be attachable as "property having a situs in this state, claimed or owned by a nonresident". Here, the situs of the contract obligation is the residence of the obligor. Didn't therefore the attachment reach a contract obligation found in the state of Louisiana?

Property is defined by Article 5251, La. C.C., Pro. as including "all classes of property recognized under the laws of the State, movable or immovable, corporeal." So said the trial court below. Also, please note the reference in that decision to Comment C under La. C. Civ. Pro. Art. 3541 stating: "The source article [Art. 240 of the Code of Practice], refers to the defendant's 'property, rights or credits.' The single term property is sufficient to include all species of property, and it is used throughout the title."

These definitions are broad enough to cover the rights of the defendant in the letters before payment, and were designed to make them attachable even though they may not have been considered attachable prior to 1961. Hence, it was error to dismiss this suit for lack of jurisdiction.

The Relative Rights Of Banco Do Brasil And The Attaching Plaintiff

Hibernia's answers also state that the proceeds of letter of credit number 24349 were paid to Banco do Brasil as the owner of the draft. The bank made that decision and it took the risks of doing so. There is no evidence of what the relationship of Banco do Brasil is to the letters in question. Was it a collection bank and hence an agent of the beneficiary? If so, wasn't fraud committed upon the attaching creditor? Was it a purchaser for value with or without notice of the attachment? Regardless, even in its most favorable position, Banco do Brasil was never more than an assignee of the beneficiary taking the avails of the letter with all of the infirmities attaching to its assignor, the defendant-beneficiary, and subject to the defenses of the obligor when it may be called to pay under the letters.

As between such assignee and the attaching plaintiff, the intervening attachment, preceding the asignee's demand for payment, takes precedence. See *Erickson* v. *Refiners Export Co., Inc.*, 264 App. Div. 525, 527, 528. It is an incident of a special letter of credit that only the beneficiary may demand payment, making the letter of credit a non-negotiable obligation, ex proprio vigore. Hence, the draft drawn by the beneficiary is subject to intervening rights of attaching creditors. This rule has or should have been familiar to Banco do Brasil. When it took the draft whether for collection or by purchase, it took the draft subject to this rule. When Hibernia decided to pay (whether true or false, it has never been tested by a trier of the facts) it took the risk of disobedience to the attachment. As a garnishee it should have stood by indifferently as to who should have the money it owed. When an attachment is served up it, it becomes a stakeholder, it must let the law take its course. It is bound to protect the rights of all parties, to render

full disclosure to them, and to notify the parties in interest. It may not prolong the proceedings unnecessarily, either. See 6 Am. Jur. 2d, Attachments, Section 346.

Here, Hibernia did not file its answers (its first communication to plaintiff) until May 4, 1970 after payment of the proceeds to Banco do Brasil. In the meantime, between the date of attachment, March 20, 1970 and the filing of the answers, the defendant's goods had arrived at New Orleans and were delivered to the buyer who had obtained the shipping documents from the bank. Was Hibernia mindful of its legal duty to remain indifferent? Hardly. It made sure that the goods themselves were delivered to the buyer before revealing its intention or decision to pay Banco do Brasil in disregard of the attachment. It would have been an easy enough matter for plaintiff to have attached the goods, despite the legal title thereto being in the holder of the bill of lading. By such attachment that legal title would have become impaired and that impairment would have justified the bank's refusal to pay the letters. Instead, Hibernia clearly acted in disregard of the attachment. It attempted justification for such unlawful action by arguing this litigation, that it had no property rights and it has caused the Court of Appeals to accept such a rule which is patently at variance to the prevailing rule established in this court and in the other circuits in our country. Besides, this matter involves an incident of foreign trade which would make the rule of uniformity, as in admiralty, highly desirable.

Was Plaintiff Denied Its Constitutional Right To Trial Of The Fact Issues?

As the decisions under review were made on a motion addressed to the jurisdiction of the court, and as there were many issues of fact presented in the pleadings, when the court below decided such issue in favor of the defendant, they deprived plaintiff of its constitutional right

to a trial by jury of those issues. Such a trial is a constitutional guarantee by Amendment Seven.

This question has come up on motions for summary judgment. This court has laid down the rule that the motion may be granted if no issue of fact is stated in the papers, but, where issues do appear the motion may not be granted. See 6 Moore's Federal Practice, par. 56.06, and particularly the discussion of the comparison of the motion for summary judgment to the motion for a directed verdict at par. 56.02(10). See, also, *Fideltiy & Deposit Co. of Maryland* v. *United States,* 187 U.S. 315; *Sartor* v. *Arkansas Natural Gas Co.,* 321 U.S. 620. Here the facts are seriously in dispute with respect to the incident of property rights as they existed on March 20, 1970. Even those facts solely in the possession of the bank or the defendant, if unknown to plaintiff, which is so, would entitle plaintiff to a trial by a trier of the facts.

WHEREFORE, plaintiff respectfully submits that serious error needing the intervention of this court has been demonstrated and prays for a writ of certiorari to the Court of Appeals of the Fifth Circuit.

Respectfully submitted,

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Certificate.

I HEREBY CERTIFY that three copies of the above and foregoing petition have been served upon MR. HAROLD R. AINSWORTH, 2307 American Bank Building, New Orleans, Louisiana 70130 and upon MR. LOUIS B. CLAVERIE and MR. PAUL JAYGOOD, 1300 Hibernia Bank Building, New Orleans, Louisiana 70112, by depositing same in the United States Mails, first class postage prepaid, this day of April, 1972.

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WILLIAM A. PORTEOUS, III